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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KIM LAMB et al., Plaintiffs and Appellants, v. THE SAN FRANCISCO ELECTRIC TOUR COMPANY et al., Defendants and Respondents.	A142888 (San Francisco County Super. Ct. No. CGC-12-524001)

Kim Lamb was injured while taking a tour in Golden Gate Park on a Segway upright electric scooter. She and her husband sued respondents, and the trial court granted respondents' summary judgment motion. The Lambs contend the court erred, because the agreement by which they purportedly assumed the risk of the activity and released respondents from liability was fraudulently induced, unenforceable because respondents violated its terms, and unenforceable as to acts of gross negligence. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

On July 22, 2012, Kim Lamb (Kim) and her husband Jaye Lamb (Jaye) went to Golden Gate Park with their son to take a guided tour of the park on individual Segway transporter vehicles. Respondent TourCorp.com, Inc. (TourCorp) provided the tour. TourCorp's Segway operations were assumed by respondent The San Francisco Electric Tour Company, Inc., effective November 10, 2012. TourCorp's president and owner is respondent Brian Huber (Huber).

A. Release Agreement: Waiver and Assumption of Risk

At TourCorp's registration area, the Lambs received a set of laminated documents to read, including a four-page "Waiver" (Release Agreement). About 10 minutes later, at the request of a TourCorp representative, the Lambs signed the screen of an iPad or similar device; the screen did not include the text of the Release Agreement, but there is no dispute in this appeal that the Lambs manifested their assent to its terms.

The first page of the Release Agreement contained the following language: "PLEASE READ CAREFULLY—THIS CONTAINS A RELEASE OF LIABILITY AND AN ARBITRATION AGREEMENT. . . . [¶] DO NOT SIGN IT IF YOU DO NOT AGREE TO BE BOUND BY ITS TERMS."

Further on the first page, the Release Agreement provided: "Guided tour assumption of risk, conditions and representations. [¶] . . . [¶] I understand that use of Segway motorized equipment or Electric Bikes for recreational purposes and related activities (collectively "the Activity") can be dangerous and involve the risks of injury or death. I understand and I am aware that these risks include, but are not limited to: [¶] variable weather conditions; [¶] *variable road conditions, including* uneven, wet or slippery pavement, grass, brush, loose gravel, and *rough or muddy dirt trails*; [¶] *obstacles and other hazards, including trees, shrubbery, erosion, variations in terrain, hills or curves;* [¶] loss of control or failure to operate the vehicle in a safe fashion; [¶] vehicular and pedestrian traffic congestion; [¶] collisions with persons, animals or natural or man-made objects; [¶] the conduct of other participants in the Activity. [¶] Despite the risks involved, and in consideration of the right to participate in the Activity, **I voluntarily agree to expressly assume all risks of injury or death** that might be associated with participation in the Activity or any use of the equipment or facilities or TourCorp.com, Inc. dba Electric Tour Company." (Italics added, boldface in original.)

The Release Agreement continued: "**I agree to release from liability and never to sue TourCorp.com, Inc.,** its subsidiaries and affiliates, or their agents, officers, directors, owners, coordinators, landowners and employees (collectively 'TourCorp') for

any damage, injury or death to me or my property related to my participation in the Activity or use of any of TourCorp's equipment or facilities, including based on TourCorp's alleged negligence, strict liability or breach of warranty. [¶] . . . [¶] With a complete and full understanding of this **Release and Waiver of Liability and Indemnity Agreement**, I nevertheless enter into this agreement freely and voluntarily and agree that it is binding [upon] me, my heirs, assigns, legal representatives, and any other person acting on my behalf."

Beginning on the second page, the Release Agreement set forth representations of the tour participants, including representations that they were within a specified range of age and weight, would wear the provided helmet and reflective vest, understood TourCorp staff was available to answer questions about the equipment and route, would observe traffic laws, accepted the TourCorp equipment "as is," and would not be under the influence of alcohol or other mood-altering substance. In addition, this portion of the Release Agreement provided: "I REPRESENT AND agree that: [¶] . . . [¶] *I agree to utilize the Segway/Electric Bike only on streets, paved roads and paved bike trails at all times*. Segways and Bikes are not allowed on sidewalks in San Francisco. Bikes are not allowed on sidewalks in Sausalito." (Italics added.)

B. Training

Before the Segway tour began, the Lambs were provided with a 20- to 30-minute training session, including instruction on how to start, stop, and steer the Segway. The training also included practice riding over an uneven surface (using a plywood ramp). It did not include a demonstration or practice specific to use on a dirt trail.

The Lambs contend they were not told by any TourCorp representative, before the tour began, that they would be traveling on unpaved surfaces. Every staff member and guide knew, however, that the tour would not be conducted entirely on paved surfaces. This was the first time Kim had ridden a Segway.

C. The Tour

The tour participants were divided into smaller groups, each led by a guide. The Lambs' group consisted of 10 to 15 participants, led by guide Dane Ballard. Ballard instructed the participants to stay together: wherever he went, they were to "move in one body" with him. The participants' helmets were equipped with radio earpieces by which they could hear the guide but could not communicate back. The tour proceeded in a single-file line, with Ballard in front.

Approximately 45 minutes into the tour, Ballard stopped and informed the group that they would be proceeding down a dirt path, which was covered by bark or mulch. Ballard said, "You guys have done so good today that we are going off-roading," and everyone laughed. Then he advised, "If any of you feel uncomfortable with this, you can hang back a bit and come last so that you don't feel rushed."

Kim did not think the path looked safe and had not thought her Segway was capable of traveling off of smooth surfaces. But she was not told of an alternate route to the bottom of the hill, she had been instructed to remain with the group, and she saw no way of communicating with Ballard at that point. Further, she assumed Ballard had determined it was safe. Jaye and their son proceeded down the path, and Kim started down the path as well, trying to stay toward the back of the line.

While on the path, Kim saw a large root protruding from the left, but she had no time to react to it and could not avoid it. Kim rode into the root, lost her balance, fell, and suffered injuries that required multiple surgeries.

D. The Complaint

Kim filed a complaint against respondents in September 2012, asserting causes of action for motor vehicle negligence, general negligence, and common carrier negligence. The operative first amended complaint, filed in November 2013, added Jaye as a plaintiff in regard to a loss of consortium claim, and named two additional defendants (Segway, Inc. and Segway, LLC) who are not parties to this appeal.

E. Summary Judgment Motion

Respondents filed a motion for summary judgment or, in the alternative, summary adjudication in November 2013. The motion asserted that judgment should be granted for respondents based on the express waiver provision in the Release Agreement, the express assumption of risk provision in the Release Agreement, and the primary assumption of risk doctrine. Alternatively, respondents urged, judgment should be entered in favor of Huber (because he played no part in the incident) and The San Francisco Electric Tour Company, Inc. (because it had no ownership or control over the Segway operations at the time of the incident).

The Lambs opposed respondents' motion on several grounds, including those they assert in this appeal: the Release Agreement was fraudulently induced; it was breached by respondents; respondents cannot establish an express waiver or express assumption of the risk based on the Release Agreement; liability cannot be waived for gross negligence; and respondents failed to establish a defense based on the doctrine of primary assumption of the risk.

In support of their respective positions, the parties submitted declarations and separate statements of undisputed material facts, asserting the facts we set forth *ante*.

F. Trial Court's Ruling

After issuing a tentative ruling and holding a hearing, the court granted respondents' motion for summary judgment by written order on March 5, 2014. The order set forth the language of the tentative ruling: "Defendants have met their initial burden to show that Plaintiffs executed a valid Release/Waiver that contemplates the circumstances of Ms. Lamb's accident. Consequently, Plaintiffs have not met their shifting burden. Plaintiffs' inability to verify the Release/Waiver produced by Defendants does not create a triable issue of fact. The Release/Waiver enumerates riding conditions that include rough or muddy dirt trails, obstacles and hazards including trees and uneven terrain. Plaintiffs' evidence does not demonstrate that Defendants made any misrepresentations or breached any agreement to remain on paved surfaces." The court

did not address respondents' separate defense based on the primary assumption of risk doctrine or their other arguments. Nor did it rule on the parties' evidentiary objections.

The court's written order, prepared by respondents' counsel and approved as to form by the Lambs' counsel, is entitled "Order Granting Defendants' Motion for Summary Judgment/Adjudication." In addition to the language quoted above, the order stated: "Accordingly, the Motion is GRANTED and [respondents] are ordered dismissed from this case, with prejudice."

G. Appeal

Respondents served a notice of entry of the March 5, 2014, order on March 6, 2014.

On July 18, 2014, the Lambs filed a motion for entry of judgment, contending the order of March 5, 2014, was only an order granting respondents' motion. Respondents countered that the order of March 5, 2014, was not just an order granting the summary judgment motion, but also an order of dismissal, and therefore constituted the judgment in the case. The court concluded that the "March 5, 2014 order granting defendant's motion for summary judgment is not a 'judgment' " and ordered entry of judgment on September 4, 2014.

In the meantime, the Lambs filed a notice of appeal on August 28, 2014. After the judgment was entered on September 4, 2014, they filed a supplemental notice of appeal.

II. DISCUSSION

A. Timeliness of the Appeal

Respondents argue that the "Order Granting Defendants' Motion for Summary Judgment/Adjudication," approved as to form by the Lambs' counsel and signed by the court on March 5, 2014, constituted a final judgment because it explicitly stated that respondents were "ordered dismissed from this case, with prejudice." (Citing *Gardner v. Horrall* (1951) 108 Cal.App.2d 417, 418 [not addressing appealability, but referring to an "order of dismissal, which constitutes a 'final judgment' "]; *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 6 (*Swain*).) Because notice of this order was served on

March 6, 2014, respondents contend the Lambs were required to file a notice of appeal within 60 days thereafter—by May 5, 2014. (Cal. Rules of Court, rule 8.104(a)(1)(B).) Therefore, respondents maintain, the appeal is untimely and must be dismissed. Respondents are incorrect.

A summary *judgment* is directly appealable, but an order granting a summary judgment *motion* is not. (*Saben, Earlix & Associates v. Fillet* (2005) 134 Cal.App.4th 1024, 1030; *Allabach v. Santa Clara County Fair Assn.* (1996) 46 Cal.App.4th 1007, 1010 [" '[a]n order granting a motion for summary judgment is a nonappealable preliminary order' "]; see Code Civ. Proc., § 437c, subd. (m)(1) [summary judgment is appealable; party seeking to challenge an order granting summary judgment may petition for a peremptory writ].)

Here, the court's order was titled an order granting the summary judgment motion rather than a judgment. Although it stated that respondents were "ordered dismissed," it did not specify that respondents *were* dismissed—a narrow distinction that may nonetheless indicate that a separate judgment was contemplated. (See *Swain*, *supra*, 99 Cal.App.4th 1, 5-6 [order that it was "ORDERED, ADJUDGED AND DECREED that said Motion for Summary Judgment is granted and that judgment shall be entered forthwith in favor of [defendant] and against plaintiffs" suggested it was not a judgment because it did not specify that the action "is dismissed," and the direction that judgment "shall" be entered contemplated a further, independent action]; *Davis v. Superior Court* (2011) 196 Cal.App.4th 669, 674 (*Davis*) [order granting summary judgment motion and stating "[j]udgment is therefore entered in favor of Defendant and against Plaintiff on all causes of action" was not a judgment, because it did not state that the plaintiff shall take nothing by his complaint and that the action is hereby dismissed].)

Moreover, the trial court believed that the order of March 5, 2014, was not the actual judgment of dismissal, and respondents fail to persuade us otherwise. "Consistent with the importance of the right to appeal, we conclude that denying [the Lambs their] appellate rights requires more than an 'order' (the court's own title for its ruling) dressed

up to masquerade as a 'judgment.' " (*Davis, supra,* 196 Cal.App.4th at p. 674.) We have jurisdiction over this appeal.[1]

B. Release Agreement: Express Waiver and Express Assumption of Risk

It is undisputed that the language of the Release Agreement, if enforceable and applicable to the incident causing Kim's injuries, is sufficient to constitute an express waiver and assumption of the risk. However, the Lambs argue, the Release Agreement is unenforceable because (1) it was induced by a material misrepresentation (that the tour would not go off-road); (2) respondents materially breached it (by taking the tour off-road); (3) the incident was outside its scope (because the incident occurred off-road); and (4) the incident was the result of respondents' gross negligence. None of the Lambs' arguments is persuasive.[2]

1. Inducement by Material Misrepresentation

Under Civil Code section 1572, fraudulent inducement of a contract may be based on, inter alia, "[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true," or "[a] promise made without any intention of performing it." The Lambs argue that the Release Agreement was fraudulently induced because it represented to the Lambs that they would not be using the Segway on unpaved surfaces, when in fact TourCorp personnel knew they would. The Lambs premise their argument on the provision in the Release

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[1] We also note that respondents served a "Notice of Entry of Order Granting Defendants' Motion for Summary Judgment/Adjudication." Without service of a notice of entry of judgment or an endorsed/filed copy of the judgment, a notice of appeal does not have to be filed until 180 days after entry of the judgment. (Cal. Rules of Court, rule 8.104(a).) The Lambs' filing of their notice of appeal on August 28, 2014, was before that deadline.

[2] Respondents contend the Lambs waived their arguments concerning respondents' inducement and breach of the Release Agreement because they did not give notice that they would contest the corresponding portions of the tentative ruling at the hearing in the trial court. (See San Francisco Superior Court, Local Rules, rule 8.3(D).) Respondents are incorrect: the Lambs' arguments were included in their written opposition to the motion and ruled on by the trial court.

Agreement that reads: "I [Kim] agree to utilize the Segway/Electric Bike only on *streets*, *paved roads* and *paved bike trails* at all times." (Italics added.)

As a threshold matter, the parties debate at length the meaning of this provision and particularly the term "streets." Respondents contend "streets" should be interpreted broadly to include any paved *or unpaved* area for public passage, so that the provision did not constitute a promise to remain on paved surfaces. (See, e.g., *Short Line Associates v. City and County of San Francisco* (1978) 78 Cal.App.3d 50, 55-57, 59 [citing examples and concluding that a 20-foot plot of land was a "street" because it was for the exclusive use of pedestrians].) The Lambs urge that "streets" must be interpreted more narrowly to refer solely to paved thoroughfares, particularly those designed for vehicular traffic, so that the provision did constitute a promise to remain on paved surfaces.

But no matter which interpretation we accept for the meaning of "streets," the salient fact is that it was not a representation by *respondents*. Instead, it was a representation by *Kim*, among a number of other representations that she would not be compromising her safety or the safety of the tour (such as being of suitable age, weight, and sobriety and wearing the protective helmet and reflective vest). Nowhere in the Release Agreement do respondents expressly promise that the tour would always remain on paved surfaces. Nor can an implied promise to that effect be inferred from Kim's agreement to ride the Segway only on "streets, paved roads and paved bike trails," since respondents specifically warned Kim that the risks of Segway riding included "rough or muddy dirt trails" (that is, *unpaved* surfaces) and "variations in terrain."

In any event, a material misrepresentation under Civil Code section 1572 requires that the individual actually be *induced* by the purported misrepresentation. (*Palm v. Smither* (1942) 52 Cal.App.2d 500, 505.) The Lambs do not provide any evidence—or even allege in their first amended complaint—that Kim entered into the Release Agreement because of this particular provision.

2. Breach of Release Agreement

The Lambs next argue that the Release Agreement is unenforceable because respondents violated its terms by taking the tour off-road and therefore, they claim, outside the scope of the activity described in the Release Agreement. A material breach of a contract excuses further performance by the innocent party. (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602-1603.) Thus, the Lambs insist, as soon as Ballard took the tour down the dirt path, he breached a material term of the Release Agreement and terminated Kim's obligation to release respondents from liability.

The Lambs are incorrect. In the first place, as discussed *ante*, the covenant that Kim would ride only on streets, paved roads, and paved bike trails was a covenant by Kim, not respondents. Since respondents did not make this covenant, respondents' actions cannot constitute a material breach.

Furthermore, even if Ballard's taking the tour down the dirt path *had* breached a covenant by respondents, it would only discharge Kim from future performance under the Release Agreement; it would not vitiate her assumption of the risk that allowed her to participate in the tour in the first place. After all, Kim gained access to the tour by expressly assuming the risk of dirt trails and variations in terrain; it would make no sense to conclude that her assumption of those risks evaporated because she did, in fact, encounter those risks. Nor do the Lambs provide any legal authority for such a proposition.

3. Scope of Release Agreement

The Lambs also argue that the Release Agreement is ineffective because they did not expect to be riding on unpaved surfaces, and therefore could not have released liability for an activity in which they did not expect to engage. The argument is meritless. Whether Kim thought she would be riding on unpaved surfaces or not, the fact is that she assumed the risks involved in riding a Segway, including—as expressly set forth in the Release Agreement—the risks of "rough . . . dirt trails," "obstacles and other hazards, including trees," and "variations in terrain."

4. Gross Negligence

Lastly, the Lambs contend a liability waiver agreement does not preclude liability for gross negligence, and there was a triable issue as to whether respondents committed gross negligence in this case. We disagree.

Providers of a recreation service, such as the one here, may enforce agreements to release liability for future ordinary negligence, but not for future *gross* negligence—that is, they cannot enforce "an agreement that would remove an obligation to adhere to even a *minimal* standard of care." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 776-777 (*City of Santa Barbara*).)

Gross negligence is a " ' " 'want of even scant care' " ' " or " ' " 'an extreme departure from the ordinary standard of conduct. ' " ' " (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754; see CACI No. 425 ["Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others"]; *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186 [allegation that 911 dispatcher put emergency caller on hold would "hardly amount to gross negligence," which requires " ' " 'the want of even scant care or an extreme departure from the ordinary standard of conduct' " ' "]; *Grebing v. 24 Hour Fitness USA, Inc*. (2015) 234 Cal.App.4th 631, 634-635, 639 [no gross negligence where plaintiff was injured while using a row machine due to a broken, malfunctioning, or incorrect clip, where gym had taken several measures to ensure its equipment was well-maintained].)

The Lambs do not provide evidence that would reasonably lead a trier of fact to conclude that respondents made an *extreme* departure from the standard of care or failed to provide at least *scant* care. Respondents warned Kim that Segway riding was dangerous and that one of the risks was "rough . . . dirt trails," trees, and "variations in terrain." They provided training for at least 20 to 30 minutes, including training on an uneven surface (onto a plywood ramp), informed participants of the dirt trail before proceeding down it, and suggested to those who felt uncomfortable with the trail to take it more slowly and remain at the end of the line. Furthermore, Kim was injured when the

Segway she was riding hit a tree root—the type of danger she was warned about—but respondents had not created, concealed, or misrepresented the presence of the root or done anything to maneuver her into it. (Cf. *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856-857 [gross negligence could be found where an experienced riding coach, aware of a horse's unfitness, unreasonably increased the inherent risk of injury in horse jumping by allowing a minor rider to ride the unfit horse while concealing the horse's unfitness].)

The Lambs claim that respondents did not disclose that the Segway tour would include travel on unpaved surfaces. But respondents did, in fact, make a disclosure in this respect. As mentioned, the Release Agreement specified that one of the risks of Segway riding was "rough . . . dirt trails" and "variations in terrain," and Ballard informed the group—before heading down the trail—that they were about to do so.

The Lambs also contend the training they received from respondents was inadequate, because it did not specifically include off-road operation of the Segway. They point to a declaration by their Segway expert, William Singhose, Ph.D., who opined that the training was wholly insufficient for a novice to attempt off-road use of the Segway Model i2. However, a dispute over the manner, thoroughness, or sufficiency of the training of a participant in a recreational activity does not support a conclusion of *gross* negligence. (*Honeycutt v. Meridian Sports Club, LLC* (2014) 231 Cal.App.4th 251, 259-260 (*Honeycutt*) [no triable issue of material fact as to gross negligence where instructor held the leg of a first-time participant in a kickboxing class and directed her to "rotate," without demonstrating a roundhouse kick]; see *Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 359-362 [rescuers' use of disfavored method of rescue did not establish gross negligence].)

Next, the Lambs complain that respondents did not provide suitable and safe equipment. Singhose opined that the Segway i2 model used by TourCorp was particularly unstable and should not be used by a novice rider on unpaved surfaces, and the Segway x2 model has larger and heavier tires and is more suitable for off-road riding. Kim was injured, however, because she ran into a root. There is no evidence that it was

the use of the i2 model rather than the x2 model that proximately caused her to run into the root, fall, and become injured.[3]

The Lambs additionally claim that respondents' personnel were not adequately trained with respect to off-road use of the Segway. In this regard, the Lambs point out that TourCorp's assistant manager testified in her deposition that she was responsible for overseeing guest training and acknowledged that off-road use of Segways is more dangerous than on-road use, but she had never been trained specifically in how to operate a Segway off-road. There is no evidence, however, that Kim was injured because the assistant manager or other personnel were inadequately trained.

The Lambs further complain that Ballard had no regard for the risks to vulnerable participants like Kim, a first-time Segway rider, because he went down the path first and then departed with some of the group while others (including Kim) remained on the trail. But there is no evidence that Kim's inexperience was known to Ballard. Furthermore, Ballard did provide *some* care by stopping, warning participants they were going down the path, and advising participants to stay in the back of the line and take their time. As to proceeding down the path first, it is not unreasonable for a guide to take the lead (Jaye proceeded down the path ahead of Kim as well). And what Ballard did or did not do after Kim fell is immaterial, since it is not alleged to be a proximate cause of her injuries.

Finally, the Lambs claim that respondents did not give participants a sufficient means of communicating with the guide, since the helmets provided to the participants did not allow them to speak to the guide by radio. However, there is no evidence that Kim's inability to radio Ballard caused Kim to fall and hurt herself, or that the failure to provide a two-way radio was such an extreme departure from the standard of care as to constitute gross negligence.

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[3] The Lambs produce evidence that Singhose and his assistant took the Segway tour with two British tourists, both of whom fell. Neither of them hit the root that Kim hit. The evidence merely illustrates that riding a Segway is dangerous, which is precisely the reason that respondents would warn participants of the risks and require a release.

The Lambs fail to establish a triable issue of material fact with respect to the high standard of gross negligence.

In sum, the Lambs have not established error in the trial court's grant of summary judgment based on the Release Agreement, with respect to Kim's claims. As respondents point out, summary judgment as to Jaye's claim for loss of consortium must therefore be affirmed as well. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 746 [loss of consortium claim "stands or falls based on whether the spouse of the party alleging loss of consortium has suffered an actionable tortious injury"].)

C. Respondents' Additional Arguments for Affirmance

Respondents argue that, whether or not the Lambs' claims are barred by the Release Agreement, they are barred under the doctrine of primary assumption of the risk. We need not address this argument in light of our conclusion that the claims are barred by the Release Agreement.

We also note respondents' contentions that summary judgment should be affirmed for Huber because he played no role in the incident, and summary judgment should be affirmed for The San Francisco Electric Tour Company, Inc., because it had no ownership or control over the Segway operations at the time of Kim's injuries. Because the Lambs have not submitted substantial argument to the contrary, these contentions provide further and additional bases for affirming the judgment.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A142888)